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SUPREME COURT, STATE OF COLORADO

Case No. 93 SA 017

On Appeal from the District Court, City and County of Denver
H. Jeffrey Bayless, Judge; Case No. 92 CV 7223

BRIEF FOR AMICI CURIAE
THE AMERICAN JEWISH COMMITTEE, THE UNITED CHURCH OF CHRIST OFFICE FOR CHURCH IN SOCIETY, THE UNION OF AMERICAN HEBREW CONGREGATIONS, THE UNITARIAN UNIVERSALIST ASSOCIATION, AND THE ANTI-DEFAMATION LEAGUE

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, AND THE CITY COUNCIL OF ASPEN,

Plaintiffs-Appellees,

v.

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants-Appellants.

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Interests of Amici Curiae

The AMERICAN JEWISH COMMITTEE ("AJC") is a national membership organization founded in 1906, a time of pogroms in Europe and rising anti-Semitism in America, to protect the civil and religious rights of Jews. The AJC has chapters throughout the United States, including Colorado. The AJC believes that civil and religious rights can be secured for Jews only if the rights of all Americans are equally secure. Therefore, AJC has been actively involved since the 1930s in the cause of civil rights.

As an extension of AJC's opposition to invidious discrimination based on race, religion, sex, and national origin, AJC is also opposed to discrimination based on sexual orientation in employment, housing, education and public accommodations.[1]

The UNITED CHURCH OF CHRIST OFFICE FOR CHURCH IN SOCIETY ("UCC") is a national instrumentality of the United Church of Christ, a denomination of approximately 1.6 million members and 6400 churches, including 73 churches in Colorado. Its predecessor agency, the Council for Christian Social Action, in 1969 declared its opposition to all laws criminalizing consensual homosexual expression in private and urged their repeal. It also called for an end to employment discrimination and other forms of discrimination against homosexuals. In 1975, the United Church of Christ General Synod, the denomination's most representative body, passed a pronouncement calling for federal, state, and local legislation to guarantee civil liberties for all and to forbid discrimination related to sexual preference. In 1973 the Executive Council recommended that homosexuality, per se, not be a bar to ordination but that Associations should

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[1]On March 26, 1993, this Court granted the American Jewish Committee leave to file an Amicus Curiae Brief in this matter. In its Motion seeking such leave, the AJC indicated that other groups with similar interests might join the AJC in its brief. Those parties are listed herein as additional Amici Curiae.

consider a candidate's total view of human sexuality and its moral expression. Since then the UCC, by vote of Associations across the country, has ordained gays and lesbians for Christian ministry.

For over twenty years many parts of the United Church of Christ have been in the forefront in seeking an end to discrimination against gays and lesbians. UCC clergy and churches in Colorado were vocal in opposition to Amendment 2. Throughout its diverse history from the days when religious vision for a new society led the Mayflower Pilgrims to cross the sea in 1620, UCC has consistently believed that when a society attempts to structure itself so as to refuse by law to offer protection to a group of citizens who face discrimination and abuse, the very purpose of civil society has been violated.

THE UNION OF AMERICAN HEBREW CONGREGATIONS ("UAHC") is the congregational arm of Reform Jewry, comprising 850 synagogues with a membership of over 1.5 million Jews in the United States. During the more than one hundred years of its existence, the UAHC has been a passionate advocate for ameliorating discrimination against all people. The protections accorded religious minorities -- including the Jewish Community -- are only as strong as the protections accorded other persecuted groups. For decades, the Reform Jewish Movement has opposed any discrimination against people on the basis of sexual orientation.

The UNITARIAN UNIVERSALIST ASSOCIATION is a religious association of more than 1,000 congregations in the United States, Canada and elsewhere. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. In particular, the Association has adopted numerous resolutions affirming the principles of separation of church and state, personal religious freedom and the right to privacy. Most relevant to the case at bar is the Association's resolutions (a) opposing discrimination based

on sexual orientation or practice and (b) affirming the goal of equality, dignity and respect for all people, regardless of affectional or sexual orientation.

The ANTI-DEFAMATION LEAGUE ("ADL") is one of the nation's oldest civil rights organizations. It was founded in 1913 to combat anti-semitism and to promote good will among all races, ethnic groups and religions. As set out in its charter, ADL's "ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." For 80 years, ADL has been active in the fight against discrimination in employment, housing, education and public accommodations.

The ADL joins in this amicus curiae brief as part of its continuing effort to secure justice and fair treatment to all. It is ADL's belief that when the rights of any single group of citizens are jeopardized, the rights of all citizens are jeopardized. As Amendment 2 places the rights of gays and lesbians in jeopardy, the ADL opposes it as a threat to the rights of all citizens.

All of these Amici recognize that the fundamental rights and liberties of all Americans are at risk if the rights and liberties of any targeted group of Americans is threatened.

The Amici's understanding is influenced by the experience of Protestant Minister Martin Niemöller during the Nazi era in Germany. Niemöller initially welcomed the Nazis' ascendance to power in 1933; however, he soon became disillusioned by Hitler's effort at Nazification of the German Protestant churches. Niemöller then became a leader in resistance to this effort which led to his imprisonment in concentration camps for seven years until he was liberated by Allied troops. William L. Shirer, The Rise and Fall of the Third Reich 235-39 (1960).

After his release, Pastor Niemöller offered this now famous observation:

First they came for the socialists, and I did not speak out --
because I was not a socialist.
Then they came for the trade unionists, and I did not speak out --
because I was not a trade unionist.
Then they came for the Jews, and I did not speak out --
because I was not a Jew.
Then they came for me -- and there was no one left to speak for me.

Hubert G. Locke, Exile in the Fatherland: Martin Niemöller's Letters from Moabit Prison viii (1986) (Preface by Franklin H. Littell).[2]

This historical lesson is a major motivating factor behind each of the Amici's opposition to discrimination on the basis of sexual orientation.

For this and other reasons hereinafter set forth, the Amici parties submit the following Brief urging affirmance of the trial court's decision granting a preliminary injunction against enforcement of Amendment 2.

[2]This statement by Paster Niemöller is part of the Permanent Exhibition at the United States Holocaust Memorial Museum, in Washington, D.C.

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Plaintiffs-Appellees,

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ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants-Appellants.

INTRODUCTORY STATEMENT

On November 3, 1992, a majority of the voters casting ballots on the issue passed an initiated Amendment to the Colorado Constitution known as "Amendment 2."

Amendment 2 provides:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have any claim of minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

(Emphasis added).

Amendment 2, by its express terms, prohibits the State of Colorado and any component of State government from taking any action which would prevent or redress discrimination against lesbians, gay men or bi-sexuals because of their sexual orientation or their personal relationships.

Rather than simply prohibiting the creation of a "protected status based on homosexual, lesbian or bi-sexual orientation," as its title suggests, Amendment 2 actually creates constitutionally "protected discriminatory rights," without limitation, against gay men, lesbians or bi-sexuals.

On November 12, 1992, the Plaintiffs-Appellees ("Plaintiffs") filed suit seeking to have Amendment 2 declared unconstitutional and to enjoin its enforcement. On January 15, 1993, District Judge H. Jeffrey Bayless granted Plaintiffs' motion to preliminarily enjoin the enforcement of Amendment 2 pending a trial on the merits of Plaintiffs' claims. The trial court based its decision on its conclusion that Amendment 2 infringes on fundamental rights and liberties; therefore, it violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution unless the State can justify the authorized discrimination under the "compelling state interest" test. (v. 7, pp. 29-30.) This appeal by the State of Colorado followed.

The Amici present historical information in their Brief to aid this Court in evaluating the constitutionality of Amendment 2. This history should assist the Court in understanding that similar schemes of discrimination, justified by "morality," have in the past led to the most

horrible persecution of vast numbers of people. As Justice Brennan cogently observed, "we remain imprisoned by the past as long as we deny its influence in the present." McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (dissenting opinion).[1]

In providing this historical perspective, the Amici do not claim that Coloradans who voted for Amendment 2 intended to impose Nazi or Stalinist rule in this State. Indeed, because the campaign promoting Amendment 2 by its chief proponent, Colorado For Family Values ("CFV"), deliberately emphasized preventing "special rights" for gays and lesbians, it is doubtful that many voters understood Amendment 2's expressed discriminatory purpose. (v. 4, p. 26.)

The Amici also appreciate the fact that Colorado today is a long way from Germany and the U.S.S.R. in the 1930s. A major reason why American democracy has never long progressed down the path to totalitarianism has been the barriers in our Constitution, particularly those erected by the Equal Protection Clause, which have prevented more subtle discriminatory statutes than Amendment 2 from evolving into wide-scale repressive government.

The Amici submit that, viewed in an historical context, Amendment 2 undermines the fundamental rights and liberties of lesbians, gay men and bisexuals; upholding its constitutionality

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[1]Quoted in Laurence H. Tribe, American Constitutional Law 1521 (2d ed. 1988), §16-21 Making Sense of the Equal Protection Clause: A Right Not to be Subjugated. Professor Tribe also recognized the necessity of historical review in equal protection analyses:

> Mediated by the antisubjugation principle, the equal protection clause asks whether the particular conditions complained of, examined in their social and historical context, are a manifestation or a legacy of official oppression.

Id. at 1516. (Emphasis added.)

could lead to similar infringements on the individual liberties of all Americans.[2] Therefore, Amendment 2's constitutionality should be determined under a "strict scrutiny" test.

SUMMARY OF ARGUMENT

1. Historical precedents, including the treatment of homosexuals and other historically persecuted groups in Nazi Germany and the Soviet Union, support the conclusion that Amendment 2 infringes upon such fundamental rights as freedom of association and the right to petition government for redress of grievances.

Since these fundamental freedoms of "homosexuals, lesbians, and bisexuals" are infringed by Amendment 2, that Amendment is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, unless the State can demonstrate that Amendment 2 is both narrowly tailored and necessarily related to a compelling State interest.

2. Also, since the primary purpose of Amendment 2, as promoted by CFV, is religious and not secular, Amendment 2 is not even rationally related to a legitimate governmental purpose, let alone justified by a compelling State interest.

3. History demonstrates that the unimpeded right to discriminate against one traditionally persecuted segment of society can be a first step towards subversion of constitutional democracy. If sweeping, State-sanctioned discrimination, as authorized by Amendment 2, is

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[2]CFV seeks to dismiss the relevance of historical evidence through the totally unsubstantiated assertion that homosexuals "cannot demonstrate a history of discrimination comparable to what racial minorities have experienced." (Brief Amicus Curiae of CFV, at 8-9 n.7.) The historical record summarized in this Brief refutes CFV's contention.

constitutionally permissible, the fundamental freedoms of all citizens of Colorado may well be compromised. For this additional important reason, Amendment 2 should be subjected to the strict scrutiny test under the Equal Protection Clause.

ARGUMENT

I. AMENDMENT 2 INFRINGES ON THE FUNDAMENTAL RIGHTS AND LIBERTIES OF HOMOSEXUALS, LESBIANS AND BI-SEXUALS.[3]

Amendment 2, in effect, authorizes and encourages sweeping discrimination against lesbians, gay men and bi-sexuals in virtually every aspect of human endeavor in the State of Colorado. This includes, but is not limited to, the central components of American society: education, employment, housing and access to public accommodations. Amendment 2 also renders futile any attempted exercise, by those now constitutionally defined as second-class citizens, of political rights afforded to all citizens, such as the right to seek protection from the State government against discrimination.

Such all-encompassing, State-sanctioned discrimination, as is hereinafter demonstrated, infringes on fundamental rights and liberties of gays as citizens and persons under the U.S. Constitution.

The U.S. Supreme Court has repeatedly held that "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully enforced." Harper v. Virginia State Bd.

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[3]Hereafter collectively referred to as "gays" or "gay people."

of Elections, 383 U.S. 663, 670 (1966). This "strict scrutiny" standard of review requires "the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." Plyler v. Doe, 457 U.S. 202, 216-17 (1982); Parrish v. Lamm, 758 P.2d 1356, 1370 (Colo. 1988).

"A state enactment cannot be construed for purposes of constitutional analysis without concern for its immediate objective . . . and for its ultimate effect. . . ." Mulkey v. Reitman, 64 Cal. 2d 529, 533-34 (1966), aff'd, 387 U.S. 369, 373 (1967). In determining whether a State constitutional amendment is infected with an invidious discriminatory purpose, this Court should consider the facts and circumstances which led to enactment of the law, including statements by its sponsors. Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 (1969); Citizens for Responsible Behavior v. Superior Court, 1 Cal. App. 4th 1013, 1029-30, 2 Cal. Rptr. 2d 648, 657-58 (1992); Parr v. Municipal Court, 3 Cal. 3d 861, 865, 92 Cal. Rptr. 153, cert. denied, 404 U.S. 869 (1971); see Colorado Common Cause v. Bledsoe, 810 P.2d 201, 209 (Colo. 1991).

A. Freedom of Association.

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." Healy v. James, 408 U.S. 169, 181 (1972). Freedom of association is "protected not only against heavy handed frontal attack, but also from being stifled by more subtle governmental interference." Id. at 183. Courts "are not free to disregard the practical realities" that a sweeping right to discriminate against gay people in all

spheres of life, as authorized by Amendment 2, can reasonably be expected to have on their freedom of expression. Id.

The principal proponent of Amendment 2, Colorado for Family Values ("CFV"), in its position papers promoting Amendment 2, makes it clear that one of that Amendment's purposes is to curtail the potential success of the lesbian/gay civil rights movement. CFV seeks to preclude the ability of gays to seek and obtain protection, through enactment of State and local laws, against discrimination on the basis of their sexual orientation. Special Gay Rights Legislation, 1991 ("Pl. Ex. 11") at 1; Special Class Protection for Gays: A Question of Behavior and Consequences, 1992 ("Pl. Ex. 12") at 1-2.[4]

Amendment 2, by prohibiting such protection against discrimination, will effectively penalize, curtail, deter and chill the exercise by gays of their freedom of association for the purpose of combatting, preventing or prohibiting the very discrimination authorized by that Amendment.

For example, in order to carry out Amendment 2's discriminatory intent against homosexuals, it will be necessary to identify homosexuals. Membership in organizations promoting gay civil rights in association with other lesbians and gay men, as well as public expressions of a gay person's sexual identity or orientation, could be used against the targeted victims of Amendment 2 in effectuating its discriminatory purpose. Hence, the freedom of gays to publicly declare their sexual identity or to associate for political purposes will be discouraged,

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[4]These two position papers were prepared by CFV and submitted to the Colorado Legislative Council as part of CFV's effort to place Amendment 2 on the ballot in Colorado. (v.3, pp. 55-56.)

curtailed and deterred. Roberts v. United States Jaycees, 468 U.S. 609, 622-23 (1984); NAACP v. Alabama, 357 U.S. 449, 460-62 (1958).[5]

Also, Amendment 2 may create an incentive for the compilation of "gay" lists by private individuals and public organizations as a means of facilitating discrimination against gays. While the State and its subdivisions are precluded from preventing discrimination, nothing in Amendment 2 inhibits the State from passing laws and policies promoting Amendment 2's

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[5]Not only would disclosure of protected associations expose gay men and women to discrimination, such as "economic reprisal" and "loss of employment," under Amendment 2, but it is also likely to result in the kind of "threats, harassment, or reprisals" gays have historically suffered. See NAACP v. Alabama, 357 U.S. at 462-63; Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 99, 101-02 (1982).

Gays in this country have faced violence and discrimination "from colonial times to the present." Note, An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality, 57 So. Cal. L. Rev. 797, 825 and nn. 177-78 (1984) (Note contains references to cases and research demonstrating discrimination against gays). Several of the Plaintiffs testified about their personal experiences with employment discrimination and harassment because they are gay. Testimony of Angela Romero (v.4, pp. 107, 109); Testimony of Paul Brown (v.4, pp. 87-89).

Since the passage of Amendment 2, violence against gays already appears to be rising. See Gays See Surge in Violence: Amendment 2 cited in national, state reports, Denver Post, Mar. 12, 1993, at 1B, (1992 anti-gay incidents increased by 129% in Colorado); Two Anti-Gay Posters Assailed as Despicable, Denver Post, Mar. 27, 1993, at 4B (one poster reads: "DEATH PENALTY FOR HOMOSEXUALS is Prescribed in the BIBLE." Another poster, listing the same post office box number as the first one, depicts a hooded Klansman with the message: "I Want You for the Knights of the Ku Klux Klan.")

A report issued April 28, 1993, by a University of Colorado-Boulder Chancellor's Task Force on Gay, Lesbian and Bisexual Issues found substantial evidence of gays being targeted for "verbal and physical harassment and attacks, intimidation by employers, and death threats." According to the report, "Even C.U. President Judith Albino, threatened by a 'soldier of God' with death if she spoke at a campus 'fag rally,' was compelled to wear a bullet proof vest when she addressed an April 1992 gay and lesbian studies conference on campus." Report: C.U. Gays Harassed, Boulder Daily Camera, April 29, 1993, at 1B. Plaintiff John Miller, a Professor at the University of Colorado - Colorado Springs, testified about discrimination and harassment against gays at the University. (v.4, pp. 11-13.)

discriminatory purposes against homosexuals.[6] Indeed, the State government and the courts can become allies only of those seeking to exercise their protected right to discriminate against gays. Such efforts in aid of the right to discriminate under Amendment 2 may well lead to violation of gay people's rights to freedom of association. See NAACP v. Alabama, 357 U.S. at 459, 466.

Substantial historical evidence supports the potential encroachment on homosexuals' freedom of expression under Amendment 2's discriminatory scheme. "Gays in America have historically faced discrimination." Note, supra, 57 So. Cal. L. Rev. at 824. See generally, W. Rubenstein, Lesbians, Gay Men, and the Law 155-242 (1993).

Persecution of gays has also occurred in other countries in the modern era. For example, attacks on homosexuals in the Nazi era began shortly after Adolf Hitler's appointment to the chancellorship of Germany in January 1933. Those first rounds of repression also involved suppression of the freedom of expression and association of the German homosexual civil rights movement. Two days after the Nazi parliamentary election victory on March 5, 1933, the Nazi SS broke into and searched the Berlin apartment of Kurt Hiller. Hiller, a socialist and gay, was one of the chief supporters of Magnus Hirschfeld's Scientific Humanitarian Committee, the world's first homosexual emancipation organization, which had been founded by Hirschfeld in 1897. Hiller was arrested on March 23rd and subsequently sent to prison for his political

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[6]Amendment 2 expressly provides: "This Section of the Constitution shall be in all respects self-executing." "If a constitutional provision is self-enforcing . . . then any legislation respecting the provision must facilitate enforcement and not curtail or limit any right created and conferred by the provision. . . ." Yenter v. Baker, 126 Colo. 265, 248 P.2d 311, 314 (1952).

activities. Warren Johansson & William A. Percy, Homosexuals in Germany, Simon Wiesenthal Center Annual, Vol. 7, 245 (1990).

Hirschfeld was both a Jew and an outspoken homosexual. On May 10, 1933, while Hirschfeld was abroad, his library of books, manuscripts and pictures, seized a few days before, was publicly burned, along with "condemned" books on a variety of "banned" subjects from other libraries, in an event known as the "Burning of the Books," organized by German students. Alan Bullock, Hitler and Stalin: Parallel Lives 322 (1991); Johansson & Percy, supra, at 245-46; Frank Rector, The Nazi Extermination of Homosexuals 25, 103-04 (1981).

The Nazis also crushed all homosexual organizations and social institutions that had flourished under the Weimar Republic. Johansson & Percy, supra, at 250.[7]

Lists of pariah groups targeted for persecution were frequently used by the Nazis to organize roundups of Jews, Gypsies, and gay men. See, e.g., France Discloses NAZI List of Jews, Daily Telegraph, Nov. 13, 1991, at 10; Michael Burleigh & Wolfgang Wipperman, The

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[7]The Brief Amicus Curiae of the Institute in Basic Life Principles ("IBLP") attempts to distort the historical record by suggesting that Hitler's terror was largely carried out by his homosexual henchmen, including SA (Storm Trooper) leader Ernst Röehm. IBLP Brief at 2 n.1.

IBLP ignores the fact that Hitler ordered Röehm arrested and summarily shot along with numerous SA leaders on June 30, 1934. This "Blood Purge" or "Night of the Long Knives," in reality ordered because Röehm posed a political threat to Hitler, was justified by Hitler in a speech to the Reichstag (Parliament) on July 13, 1934 on the need to purge the SA of homosexuals ("burning out" the "plague-boil of perversion"). Rector, supra, at 95.

The Blood Purge signalled escalation of the Nazi Party's official policy of persecution of homosexuals. Typical of corrupt, totalitarian regimes, some favored Nazi gay men were treated leniently while members of unpopular groups were purged after 1934. Public convictions under anti-homosexual laws numbered 50,000 during the Nazi era. Id. at 119. Many other gay men were taken into "protective custody," i.e., confined in concentration camps without any judicial proceedings. Johansson & Percy, supra, at 235-38.

Third Reich: Racial State, Class State, Modern State?, Brit.J. Holocaust Ed. 185, 194-95 (Winter 1992); Nazism 1919-1945, Vol. 2: State, Economy & Society 1933-39 (hereafter "Nazism") 548, 552-53 (J. Noakes & G. Pridham eds., 1984). Gay men who had any prior police contact became subject to immediate internment without trial in concentration camps. A card index of 30,000 gay men in one Berlin district police station aided such roundups. Rector, supra, at 120-21.

The zeal with which the Nazis pursued persecution of homosexuals was, in part, in response to Josef Stalin's anti-homosexual campaign, also begun in the 1930s. Johansson & Percy, supra, at 244-45. Even today, one's name on a "gay list" (obtained by Russian police taking down names in gay and lesbian bars) is sufficient evidence for conviction and imprisonment for sodomy under Section 175 of the Russian Criminal Code. Proof of actual sexual relations is not required. Russia's Gay Men Step Out of Soviet-Era Shadows, N.Y. Times, Feb. 10, 1993, at 3.

In Colorado, under Amendment 2, identification of the targeted victims is an integral component of the contemplated discrimination.[8] Efforts to obtain disclosure of the identity of gays in this State will be an inherent aspect of implementing Amendment 2.

In NAACP v. Alabama, 357 U.S. at 449, 462, the U.S. Supreme Court recognized that "compelled disclosure of membership in an organization engaged in advocacy of particular beliefs" was the equivalent of requiring adherents of particular religious faiths or political parties

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[8]During the period of 1923-26, when the Ku Klux Klan controlled the Denver Mayor's office and elected Klan members as Colorado Governor, Secretary of State and U.S. Senator, "mimeographed lists of proscribed Catholic merchants were circulated at Klan meetings." Shawn Lay (ed.), The Invisible Empire in the West 48 (1992); The Ku Klux Klan in Grand Junction, 1924-1927, J. of the Western Slope 6, 10-11 (1989).

to wear identifying armbands.[9] The Court held that such compelled disclosure interfered with the "inviolability of privacy in group associations . . . indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." 357 U.S. at 462.

While Amendment 2 does not expressly authorize compelled disclosure of memberships in gay organizations, fear of identification will inevitably deter some homosexuals from engaging in such associations to avoid discrimination against themselves under that Amendment. See American Communication Assn. v. Douds, 339 U.S. 382, 402 (1950). ("Under some circumstances, indirect 'discouragements undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes.'") Moreover, under the terms of Amendment 2, gays would be powerless to assert "claim[s] of discrimination" as a basis for resisting either private or State-aided efforts to identify them.

The discrimination faced by homosexuals under Amendment 2, if they exercise their constitutionally protected political rights, will inevitably chill, deter, and discourage such exercise "because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." NAACP v. Alabama, 357 U.S. at 462-63; see Citizens for Responsible Behavior v. Superior Court, 1 Cal. App. 4th at 1033.

Therefore, Amendment 2's constitutionality under the Equal Protection Clause must be tested under the strict scrutiny standard. Roberts v. United States Jaycees, 468 U.S. at

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[9]Gay men in Nazi concentration camps were forced to wear the "pink triangle," which identified them as homosexuals and singled them out for particularly harsh treatment. Ruediger Lautmann, Gay Prisoners in Concentration Camps as Compared with Jehovah's Witnesses and Political Prisoners, in Michael Berenbaum (ed.), A Mosaic of Victims: Non-Jews Persecuted and Murdered by the Nazis 200, 201-02 (1990).

623; see NAACP v. Alabama, 357 U.S. at 466; Master Printers of America v. Donovan, 751 F.2d 700, 703-04 (4th Cir. 1984), cert. denied, 474 U.S. 818 (1985).

B. The Right of Homosexuals to Seek Redress from Their State Government Against Discrimination.

Amendment 2 by its terms prohibits any organ of State government, including the legislature, the executive branch, and the courts, from providing any remedy to homosexuals for discrimination which is based on their status as homosexuals independent of any constitutionally punishable behavior. Such a constitutional amendment "allocates governmental or judicial power [solely] on the basis of a discriminatory principle." Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527, 541 (1982); see United States Dep't. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) ("a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.")

Moreover, Amendment 2 effectively prevents homosexuals from petitioning any governmental body for redress of their grievances, since by constitutional amendment, those bodies are precluded from taking any action to protect homosexuals from such discrimination even if they were so inclined. Citizens for Responsible Behavior v. Superior Court, 1 Cal. App. 4th at 1027; cf., Roberts v. United States Jaycees, 468 U.S. at 637 (O'Connor, J., concurring, quoting In re Primus, 436 U.S. 412, 426 (1978) ("'[Collective] activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment'").

Since this fundamental right under the First Amendment is clearly infringed by Amendment 2, it can only pass constitutional muster if it is justified by a compelling state interest. Citizens for Responsible Behavior v. Superior Court, 1 Cal. App. 4th at 1027 n.9.

History has demonstrated that legalization of wholesale discrimination against an historically persecuted group, without any avenue of protection by the State, can lead to the abrogation of the targeted group's fundamental rights.

For example, the Nazis' system of persecution began with the adoption of laws permitting discrimination against Jews in employment. These laws included the adoption of a provision in April 1933 which imposed the so-called "Aryan clause" on lawyers. Enforcement of this measure led to 30% of the Jewish lawyers in Germany being removed from their profession. Nazism, supra, at 527-28. For the next six years, Hitler's Nazi government employed a variety of discriminatory legislation and terror to exclude Jews and other targeted non-Aryan groups from schools, universities, journalism, public accommodations, marriage with Aryans and the right to employ Aryans in their homes. This comprehensive policy of discrimination against these groups was facilitated by the legalized withdrawal of their right to enjoyment of any governmental protection as "citizens" of the Third Reich. Id. at 527-37.[10]

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[10]The so-called "Nuremberg Laws," enacted September 15, 1935 ("for the protection of German Blood and German Honour," and the Reich Citizenship Law), were employed to strip Jews and other non-Aryans of all rights of citizens under the Nazi regime. Nazism, supra, at 527-37. Gypsies - often known as Sinti and Roma - tended to be grouped with Jews under the Nazi race laws until 1942, when decrees specifically applied anti-Jewish laws to Gypsies. Burleigh & Wippermann, supra, at 189-90.

The Equal Protection Clause stands as a constitutional barrier to prevent establishment of such second class citizenship motivated purely by a desire to discriminate, in the absence of a compelling State interest. "The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation." Plyler v. Doe, 457 U.S. at 213.

II. AMENDMENT 2 LACKS ANY "LEGITIMATE," LET ALONE COMPELLING, STATE INTEREST.

The primary goal of CFV, in promoting discrimination against homosexuals through Amendment 2, is to coerce them to accept CFV's "cure" for homosexuality -- religious conversion under CFV's concept of Christianity.[11]

In its position papers on Amendment 2, CFV's expressed intent in seeking adoption of the Amendment is not limited to curtailing the right of gays to protect themselves from invidious discrimination. CFV articulated "a still deeper purpose than merely opposing such legislation." Pl. Ex. 11, supra, at 2; Pl. Ex. 12, supra, at 3. That "deeper purpose" was to advance CFV's Christian belief that homosexuals' 'sexual addiction' can be conquered through the power of Christ." Pl. Ex. 11, supra, at 42; Pl. Ex. 12, supra, at 68.

CFV justifies discrimination against gays by explicit reference to its particular religious dogma:

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[11]The religious goals of the proponents of legislation are relevant in determining whether the contested measure has a legitimate, secular governmental purpose. See Edwards v. Aguillard, 482 U.S. 578, 591-93, 601-02 (1987) (majority and concurring opinions).

> . . . Gay behavior is what the Bible calls 'sin' because sin defines any attempt to solve human problems or meet human needs without regard to God's wisdom and solutions as found in Scripture and in His saving grace and mercy. . . .

Pl. Ex. 11, supra, at 42; Pl. Ex. 12, supra, at 67.

CFV states unequivocally: "We believe gay behavior can be chosen - and changed." Id. Its method of change is unabashedly religious:

> We ask every gay person to consider a question asked by the great prophet Isaiah:
> "Why are you striving for that which doesn't satisfy?"
> Isaiah 55:2

Id.

CFV then proposes its religious solution to homosexuality based on its claimed religious conversion of its members who allegedly were gay:

> They have found love that does satisfy - in the life-changing grace of God. In happy marriages and biological parenthood. In lives of true peace and freedom. The road to release from homosexual behavior is not an easy one. But escape can be found from the false "freedom" of gay behavior and other forms of sexual addiction. Some CFV members are living proof that sexual addiction can be conquered through the power of Christ.[12]

Id. (Emphasis added.)

CFV, of course, has a constitutional right to profess and proselytize its religious beliefs under the Free Exercise Clause of the First Amendment. However, such a non-secular goal cannot possibly constitute a legitimate governmental interest, to justify the protection afforded by Amendment 2 for discrimination against homosexuals, let alone constitute a compelling state

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[12]In a talk at the First Congregational Church in Colorado Springs, Kevin Tebedo, Director of CFV, is reported to have stated that "the point of Amendment 2 is that it establishes the authority of God." Testimony of Jean Hardisty, Ph.D. (v.5, pp. 85-86). The trial court recognized Dr. Hardisty as an expert on the "religious and political right." (v.5, p. 77.)

interest.[13] As Mr. Justice Kennedy, in his majority opinion in Lee v. Weisman, 112 S.Ct. 2649, 2656 (1992), recently recognized:

> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either prosecuted or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. . . .[14]

Therefore, absent a compelling, secular state interest, Amendment 2 violates the right of gays in Colorado to equal protection of the laws.

Neither of CFV's other motives in promoting passage of Amendment 2 -- giving effect to private prejudice toward homosexuals and preventing them from obtaining civil rights protection from discrimination emanating from such prejudice -- can constitute legitimate or compelling governmental interests.[15] Since there is no legitimate and compelling State interest to support it, Amendment 2 cannot survive any level of equal protection scrutiny.

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[13]See Edwards v. Aguillard, 482 U.S. at 592, n.14 (sponsoring State Senator's statements relevant to determination that primary purpose of Creationism Act was not secular but to advance a particular religious belief).

[14]The Plaintiffs-Appellees have challenged Amendment 2's constitutionality under the Establishment of Religion Clause of the First Amendment. That claim is before the trial court for adjudication during trial on the merits.

[15]See Palmore v. Sidoti, 466 U.S. 429, 433 (1984). In Roberts v. United States Jaycees, 468 U.S. at 626 (1984), the Supreme Court held that "assuring women equal access to . . . goods, privileges, and advantages" under Minnesota's Human Rights Act "clearly furthers compelling state interests." A fortiori, a state constitutional amendment like Amendment 2, which precludes any state entity from protecting a traditionally persecuted group from discrimination in these areas of economic opportunity cannot further either a legitimate or a compelling State interest.

Therefore, the trial court's order granting a preliminary injunction against enforcement of Amendment 2 pending a trial on the merits should be sustained.

III. AMENDMENT 2, BY INFRINGING ON THE FUNDAMENTAL FREEDOMS OF GAYS, REPRESENTS A FIRST STEP TOWARDS INFRINGEMENT ON THE FUNDAMENTAL FREEDOMS OF ALL AMERICANS. ITS IMPLEMENTATION WOULD THREATEN CONSTITUTIONAL DEMOCRACY. FOR THIS ADDITIONAL REASON, ITS CONSTITUTIONALITY MUST BE DETERMINED UNDER STRICT SCRUTINY STANDARDS.

CFV, the chief proponent and sponsor of Amendment 2, justified and promoted the Amendment's passage by appealing to the voters' traditional fear and hatred of homosexuals (i.e., homophobia).

In its position papers, campaign literature, and even in the very choice of its name, CFV's propaganda expounded its main theme: gay and bi-sexual men and women's "lifestyle" "threatens to undermine traditional family values and structures." Pl. Ex. 11, supra, at 32; Pl. Ex. 12, supra, at 53. ("Homosexuals often express deep hostility to traditional, Judeo-Christian moral beliefs and values.") CFV's appeal to widespread public homophobia is reflected in its portrayal of homosexual orientation as "chosen and unchosen at will" in order to further the alleged promiscuous, perverted, and dangerous sexual addiction of its practitioners. Pl. Ex. 11, supra, at 7, 15, 17, 28; Pl. Ex. 12, supra, at 8, 40.

According to CFV, "homosexuals are notorious practitioners of sex with minors." Pl. Ex. 11, supra, at 7; Pl. Ex. 12, supra, at 9. CFV claims that homosexual behavior "results

in extraordinary levels of virulent, sexually transmitted disease," especially AIDS. Pl. Ex. 11, supra, at 9-10; Pl. Ex. 12, supra, at 11-12.

CFV portrays gays' public behavior as "notoriously violent and even obscene." Pl. Ex. 11, supra, at 29; Pl. Ex. 12, supra, at 42. It classifies lesbian and gay sexual orientations with "necrophilia, bestiality and pedophilia," and characterizes homosexual relationships as equivalent to "other shared behaviors -murder, theft, and fraud." Pl. Ex. 11, supra, at 7; Pl. Ex. 12, supra, at 8.

CFV claims that the health threat posed by homosexuals will make it "difficult for sick persons to get hospital beds because of overcrowding by AIDS-infected homosexuals," and that affording civil rights to gays would result in "payments to homosexual AIDS patients [which] may threaten to drain Social Security's trust funds for retirees." Pl. Ex. 11, supra, at 19; Pl. Ex. 12, supra, at 28.[16]

Similar appeals to stereotyped notions have historically been used to gain support for discrimination against a variety of traditionally persecuted groups, including Blacks, Jews, and homosexuals. Mosse, Nationalism & Sexuality, supra, at 134.

The Nazis, for example, propagated their racial hygiene doctrine in order to eliminate from society a broad spectrum of people deemed "unfit." They used then-popular theories of eugenics or "race hygiene" to attempt to implement Hitler's notions of a master race.

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[16]Racist theory commonly stereotypes the "outsider" as sexually lustful, perverted and immoral, as well as "a carrier of infection threatening the health of society and the nation." George L. Mosse, Nationalism & Sexuality 133-34 (1985); George L. Mosse, Toward the Final Solution: A History of European Racism 111 (1985 ed.), citing Adolph Hitler, Mein Kampf 59-65 (Munich, 1934).

Under eugenics, those deemed unworthy would be eliminated. Sheila Faith Weiss, The Race Hygiene Movement in Germany 193, 226 (Osiris, 2nd series, 1987). In the pre-Nazi era, eugenicists developed theories for selecting and eliminating the unfit from society through various social manipulations. Id. at 195, 199. Those considered "unfit" by German eugenicists included people who were insane, alcoholics, and those having degenerative effects on the future population because of venereal disease and homosexuality. Suggestions were made for reforming Germany's penal code along eugenic lines, including sterilization of those deemed unfit to reproduce their stock. Id. at 210.

During the difficult economic times of the post-World War I Weimar Republic, articles in prominent eugenics journals called for saving welfare costs by reducing the number of such "hereditary defectives." Id. at 223.

The true nature of race hygiene is revealed in a 1930 issue of the journal Euginik:

> Civilization has eliminated natural selection. Public welfare and social assistance contribute, as an undesired side effect of a necessary duty, to the preservation and further reproduction of hereditary diseased individuals. A crushing and ever-growing burden of useless individuals unworthy of life are maintained and taken care of in institutions at the expense of the healthy - of whom a hundred thousand are today without their own place to live and millions of whom starve from lack of work. Does not today's predicament cry out strongly enough for a 'planned economy,' i.e., eugenics in health policy.

Id. at 224.

Both in campaigning for office and immediately after assuming the chancellorship of Germany, Hitler exploited the völkische German ideology, emphasizing "the union of a group of people, bound together in a common racial identity that was the source of their individuality

and creativity." Bullock, supra, at 69. Hitler and the Nazis emphasized "traditional family life, Kinder, Kirche, Küche (Children, church, and kitchen)" to expand their political base. Id. at 218.

On February 1, 1933, the day after he was sworn in as chancellor, Hitler delivered his "appeal to the German people," in which he disguised his real intentions in these traditional, conservative terms:

> The national government will preserve and defend the foundations on which the strength of our nation rests. It will take under its firm protection Christianity as the basis of our morality, and the family as the nucleus of our nation. Standing above the estates and classes, it will bring back to our people the consciousness of its racial and political unity, and the obligations arising therefrom. It wishes to base the education of German youth on respect for our great past and pride in our traditions. It will, therefore, declare merciless war on spiritual, political and cultural nihilism. Germany must not and will not sink into Communist anarchy.

Id. at 307.

However, almost immediately, the Nazis began a reign of terror over their targeted enemies. Communists, socialists, Jews, Catholic priests, homosexuals, politicians and journalists were among the first victims. Id. at 308-09; Johansson & Percy, supra, at 245-46.[17]

CFV justifies Amendment 2 based on principles and stereotypes which parallel dangerous eugenic social policies.[18] Amendment 2 authorizes legalized discrimination against

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[17]Also, anti-homosexual and anti-Jewish laws were frequently exploited for political reasons to eliminate enemies (through false accusations that the victims were homosexuals or Jewish) or for economic gain (to seize real and personal property and convert it to the Nazi leaders' and their supporters' benefit). Nazism, supra, at 551-52; Johansson & Percy, supra, at 235-37 (perjured testimony used to accuse Catholic clergy of being homosexuals and send them to prison under anti-sodomy laws); Rector, supra, at 117.

[18]SS Leader Heinrich Himmler, in charge of implementing the Nazi policy of excluding gay men from German society, also believed that homosexual orientation could be reversed. "Homosexuals, political prisoners, and Jehovah's Witnesses [were] among the groups who were

one of several unpopular groups which have historically been victimized by such policies. Thus, Amendment 2, by violating the fundamental rights of gays, constitutes a first step towards subversion of democratic institutions and infringement on the fundamental freedoms of all Americans.

The United States Supreme Court has recognized that constitutional democracy is at stake when fear, hatred and religious zealotry are translated into State policy:

> The mixing of government and religion can be a threat to free government, even if no one is forced to participate. When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some. Only "[a]nguish, hardship and bitter strife" result "when zealous religious groups struggl[e] with one another to obtain the Government's stamp of approval." . . . Such a struggle can "strain a political system to the breaking point." . . .

Lee v. Weisman, 112 S.Ct. at 2665-66. (Blackmun, J., concurring). (Citations omitted.) (Emphasis added.)

James Madison, one of the co-authors of the Bill of Rights, recognized the potential for legalized religious zeal to lead to repressive government. In his "Memorial and Remonstrance Against Religious Assessments" (1785), objecting to a bill providing tax funds to religious teachers, Madison observed:

> It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of Legislative authority. Distant as it may be, in its present

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sent to the concentration camps for re-education. They were supposed to renounce their particular orientation." Lautmann, supra, at 201. In the camps, Himmler experimented with attempted "cures" for male homosexuality through a regimen of hard work and inducements to have sexual relations with female prostitutes. Rector, supra, at 125; Heinz Hegler, The Men With the Pink Triangle 96-98 (1980).

> form, from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance.

S. Padover (ed.), The Complete Madison 303 (1953) (quoted by Blackmun J., concurring in Lee v. Weisman, 112 S.Ct. at 2666, n.10). (Emphasis added.)

As Justice Marshall noted in his concurring opinion in Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 464 (1985), "Prejudice, once let loose, is not easily cabined."

As U.S. Supreme Court equal protection jurisprudence has evolved, the Equal Protection Clause has been erected as a wall of protection not only to insulate historically persecuted groups from invidious discrimination, but also as a guardian of that core of fundamental liberties without which there can be no democracy. Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937) (those fundamental liberties "implicit in the concept of ordered liberty," without which "neither liberty nor justice would exist if [they] were sacrificed"); see, e.g., Reynolds v. Sims, 377 U.S. 533, 562 (1964).

On several occasions, legislative schemes derived from the pernicious policies of eugenics or racial hygiene have been held unconstitutional under the Equal Protection Clause. In Loving v. Virginia, 388 U.S. 1 (1967), the State of Virginia's miscegenation law, which criminalized marriage between a white person and a "colored person," was found by the Supreme Court to be "designed to maintain White Supremacy" and thus violated "the central meaning of the Equal Protection Clause." Id. at 11-12;[19] see Skinner v. Oklahoma, 316 U.S. 535, 538 n.1,

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[19]The State Supreme Court had upheld the validity of this law as serving the alleged legitimate purposes "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens" and "the obliteration of racial pride." Id at 7.

541 (1942) (eugenics-based criminal sterilization statute subject to "strict scrutiny" under the Equal Protection Clause).[20]

More recently, in Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. at 450, the Supreme Court held that a city zoning ordinance, requiring a special use permit for the operation of a group home for the mentally retarded as a "hospital for the feeble minded," violated the Equal Protection Clause. The Court found that "requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded." Id. Such an objective, "a bare . . . desire to harm a politically unpopular group," the Supreme Court reiterated, was not a legitimate State interest. Id. at 446-47; accord, United States Dep't of Agriculture v. Moreno, 413 U.S. at 534.

Also, to protect against discriminatory schemes that would single out unpopular groups for discrimination based solely on their status, the Supreme Court has recognized "the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." Plyler v. Doe, 457 U.S. at 220; see Robinson v. California, 370 U.S. 660, 666 (1962) (statute which makes "status" of narcotics addiction a criminal offense is infliction of cruel and unusual punishment).

In upholding a Minnesota public accommodations law prohibiting gender discrimination in places of public accommodation, the United States Supreme Court recognized:

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[20]"Racial Hygiene" was used by the Nazis to justify forced sterilization of mixed-race children and "hereditary defectives," including homosexuals. Weiss, supra, at 230, 233-34; Johansson & Percy, supra, 245-47.

> In the context of reviewing state actions under the Equal Protection Clause, this Court has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.

Roberts v. United States Jaycees, 468 U.S. at 625.

Implicit in these decisions is the recognition that hatred and prejudice, whether arising from anti-Semitism, homophobia, racism or sexism, when transferred into political and legal policy of State government, become tools of repression.

> The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

Palmore v. Sidoti, 466 U.S. at 433.

Indeed, the California Court of Appeals, applying these equal protection principles, recently struck down an initiated ordinance in the city of Riverside, California which created a protected private right to discriminate against homosexuals. The Riverside ordinance was motivated by animosity towards gays virtually identical to that expressed by CFV in its position papers supporting Amendment 2. Citizens for Responsible Behavior v. Superior Court, 1 Cal.App. 4th at 1013, 1029-31. The court found, from the Notice of Intent to Circulate the initiated ordinance prepared by its proponents, that "the proposed ordinance is designed to encourage discrimination and promote bias against a select class of citizens." Id. at 1030.[21]

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[21]The Riverside anti-gay ordinance, like Amendment 2 "fails utterly to make any distinction between homosexuals based on actual conduct or deportment, tarring all homosexuals - male and female alike - with the same brush of bizarre practices, gross promiscuity, and wilful exposure

That unconstitutional purpose was promoted by the sweeping nature ("wide swath") of the ordinance which authorized discrimination against homosexual orientation. Id. at 1033.

The California Appellate Court found that the ordinance did "not purport to be limited to conduct, but potentially invades those rights of privacy, association, and free expression which are fundamental to this nation's concept of the relationship between the State and the individual." Id.

The Equal Protection Clause has provided the constitutional barrier to a majority's ability to impose oppression on historically persecuted groups through initiated legislation. Hunter v. Erickson, 393 U.S. 385, 392 (1969). The courts have been the bastions for preserving the principle of equality before the law expressed in the Equal Protection Clause, especially where discrimination against traditionally persecuted groups impinges upon fundamental rights without which there can be no constitutional democracy. Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. at 453, n. 6. (Stevens, J., concurring); Washington v. Seattle Sch. Dist., 458 U.S. 457, 486 (1982).[22] As Chief Justice Warren repeated in Reynolds v. Sims:

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to probable disease. It purports to solve the perceived problems by driving away the perceived perpetrators as a class, 'guilty' and 'innocent' alike. All that is lacking is a sack of stones for throwing." Id. at 1031. See Oyama v. California, 332 U.S. 633, 657 (1948) (Murphy, J., concurring) (California Alien Land Law was "but a step in the long campaign to discourage the Japanese from entering California and to drive out those who were already there."); accord, Parr v. Municipal Court, 3 Cal. 3d at 868.

[22]"Those whom we would banish from society or from the human community itself often speak in too faint a noise to be heard above society's demand for punishment. It is the particular role of the courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life." McCleskey v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting).

> ". . . Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action."

377 U.S. at 557, (quoting Baker v. Carr, 369 U.S. 186, 226 (1962)).[23]

The State of Colorado argues that "in sum, Amendment 2 does not embody public or private discrimination in contravention of the Fourteenth Amendment." (State's Opening Brief at 43.) In so contending, the State ignores what the Supreme Court found was the effect of a similarly initiated California constitutional amendment:

> The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discrimination need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.

Reitman v. Mulkey, 387 U.S. 369, 377 (1967).[24]

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[23]The State of Colorado (in its Opening Brief at 20) confuses the majority's right to initiate legislation without judicial interference with this Court's right and duty, after passage, to "determine the validity of the legislation." McKee v. Louisville, 200 Colo. 525, 530, 616 P.2d 969, 972-73 (1980). "The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed." Hunter v. Erickson, 393 U.S. at 392.

[24]In Reitman, an initiated constitutional amendment prohibited the State or any subdivision or agency thereof from limiting the right of any person to decline to sell or rent private residential property to any person he chooses, "in his absolute discretion." Id. at 370. The U.S. Supreme Court accepted the California Supreme Court's findings that this amendment effectively repealed existing California laws prohibiting private discrimination in the housing market and established a constitutional right to discriminate which itself could only be repealed by passage of a constitutional amendment. Id. at 374-77.

Amendment 2, if upheld, would clearly have the same impact in Colorado, in even broader spheres, as the measure involved in Reitman.

In seeking constitutional approval for Amendment 2's discriminatory scheme, the State is, in effect, seeking to overturn the general principle of equal protection doctrine that

> the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.

Hunter v. Erickson, 393 U.S. at 393; Washington v. Seattle Sch. Dist., 458 U.S. at 468.

Thus, to uphold the constitutionality of Amendment 2, this Court would, at least implicitly, have to reject this principle, thereby rendering not only gays, but racial, religious, and other disfavored groups vulnerable to identical initiated constitutional amendments authorizing discrimination against them motivated by similar private prejudice and bias.

Therefore, because Amendment 2, by constitutionalizing the right to discriminate, not only infringes on the fundamental rights of lesbians, gay men and bisexuals, but also, if upheld, would lead to infringement of the fundamental rights of all individuals protected by the U.S. Constitution, this Court must require that Amendment 2's constitutionality under the Equal Protection Clause be justified by a compelling State interest.[25]

CONCLUSION

In recognition of the historical lessons outlined above and mindful of Pastor Niemöller's warning of the danger of silence in the face of oppression, the Amici herein submit that this Court should affirm Judge Bayless' decision below: (1) by requiring Amendment 2 to satisfy

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[25]As addressed in Argument II, ante, there is no legitimate or compelling State interest to justify Amendment 2's discriminatory purpose.

the Equal Protection Clause under the strict scrutiny test, and (2) by continuing in force the preliminary injunction against enforcement of Amendment 2 until a final hearing on the merits pursuant to that test.

To do otherwise - to allow the right to discriminate against homosexuals prescribed in Amendment 2 to take effect in Colorado - is to openly permit state-sanctioned discrimination against gay people and those who would protest such unjust treatment.

As Primo Levi, a survivor of the Nazi concentration and death camp at Auschwitz, warned:

> Many people - many nations - can find themselves holding, more or less wittingly, that "every stranger is an enemy." For the most part this conviction lies deep down like some latent infection; it betrays itself only in random, disconnected acts, and does not lie at the base of the system of reason. But when this does come about, when the unspoken dogma becomes the major premise in a syllogism, then, at the end of the chain, there is the Lager [concentration and death camps]. Here is the product of a conception of the world carried rigorously to its logical conclusion; so long as the conception subsists, the conclusion remains to threaten us. The story of the death camps should be understood by everyone as a sinister alarm-signal.

Primo Levi, Survival in Auschwitz 5 (1961).

Respectfully submitted this 30th day of April, 1993.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing BRIEF AMICUS CURIAE on the 3rd day of May, 1993 by regular United States mail, first class postage prepaid thereon to:

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